A

LETCHUMAY PALANIAPPAN

v.

MAHALINGAM SUBRAMANIAM & ANOR

B

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[CIVIL APPEAL NO: 12B-863-2010]
28 JUNE 2012

C ***TORT:*** *Negligence - Personal injury - Contributory negligence - Whether plaintiff exposed herself to unnecessary risks - Whether plaintiff substantially negligent - Whether plaintiff's version of accident commensurate with injuries - Apportionment of liability*

D ***TORT:*** *Negligence - Personal injury - Appeal against - Finding of fact by trial judge - Heavy reliance on interested witness - Whether witness a "manufactured or fabricated witness" - Whether finding of facts flawed*

DAMAGES: *Measure of damages - Personal injuries - Road accident - Amputation of lower limbs - Nursing care - Liability and quantum*

E

The plaintiff claimed against the defendant for general and special damages due to injuries suffered from a road accident. The plaintiff was a pedestrian crossing the road and the defendant was the lorry driver ('SD2') whom the plaintiff alleged collided into her. F The Sessions Court judge ('SJ') found the plaintiff to be 100% negligent (liable) and dismissed the plaintiff's claim. Hence, the plaintiff's appeal to this court against the decision on both issues of liability and quantum. According to the plaintiff, she alighted from a bus and successfully crossed to the middle of the road. G While standing at the middle of the road to cross to the other side of the road, suddenly, the said lorry collided into her. She fell and the lorry ran over both her legs. The plaintiff submitted that the SJ erred in accepting the defendant's version and finding the plaintiff 100% liable.

H

Held (allowing the appeal with costs):

(1) The plaintiff admitted that, by crossing and standing at the middle of the road, she had put herself in a dangerous position which exposed her to unnecessary risk. She should not have I taken safety for granted. If she still wanted to cross the road, she should have taken the sensible precaution by crossing near the traffic light which was situated about 50 meters away. Further, the fact that the plaintiff did not see the presence of the defendant's lorry, which she admitted, showed that she

was not aware and alert of her surroundings and had not ensured that the road was safe before she crossed. Thus, there was negligence on the part of the plaintiff. (para 11)

(2) The SJ accepted the defendant's version that the plaintiff was collided into by another vehicle coming from the opposite direction. However, the defendant's version did not commensurate with the injuries sustained by the plaintiff. The injuries sustained were more consistent with the plaintiff's version of being grazed by the defendant's motor lorry, falling under it and as a consequence having both her legs being ran over. (para 11)

(3) The SJ's finding that SD2 was driving at high speed was based on an incorrect and unsubstantiated premise as there was no evidence that SD2 was driving his lorry at high speed. Apart from that, the plaintiff had, in her testimony, acceded that her police report, which stated that the motor lorry was driven at high speed was untrue. (para 11)

(4) The so-called independent witness, Mr Balakumar was SD2's brother-in-law and there was great possibility that Mr Balakumar was a "manufactured or fabricated witness". Therefore, the SJ's finding of fact was flawed since it was based mainly on the evidence of Mr Balakumar without taking into account the evidence of the plaintiff, SD2, the investigating officer, the plaintiff's medical reports and the mute evidence of the sketch plan and photographs. The SJ had erred in coming to the conclusion that on the balance of probabilities, the defendant's version was inherently more probable. (paras 11 & 12)

(5) The plaintiff in crossing a heavily traffic laden road spanning a distance of 19.4 meters which she knew was an inherently dangerous feat had herself to blame for courting danger and as such was substantially negligent. At the same time, the defendant was also not entirely blameless. Thus, the liability was apportioned at 70% for the plaintiff and 30% for the defendant. (para 12)

(6) On the issue of quantum, the claim for nursing care was allowed and RM99,200 was awarded. The claim for amputation of the two lower limbs was increased from RM120,000 to RM170,000. The claim for prosthesis which was dismissed by SJ was maintained and the sum of RM34,122 awarded for loss of earning was also maintained. (para 24)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 CA ***(refd)***

Denddy Bah Derin v. R Sellurisuriamurthy Ramamutty [2010] 2 PIR [15] ***(refd)***

Gan Yook Chin & Satu Lagi lwn. Lee Ing Chin & Yang Lain [2001] 1 LNS 255 HC ***(refd)***

Hitam Abdullah & Anor v. Kok Foong Yee & Anor [1973] 1 LNS 48 PC ***(refd)***

Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor [1997] 3 CLJ 500 CA ***(refd)***

Karumalay Vanniyan & Anor v. Ananthan Rethinam [2005] 2 CLJ 429 CA ***(refd)***

Kean Yick Enterprise Sdn Bhd v. Cherating Development Sdn Bhd & Anor And Other Cases [2012] 3 CLJ 741 HC ***(refd)***

Lai Moi Lan & 6 Others v. Mahari Maskop & Anor [2008] 1 PIR [16] ***(refd)***

Ling Chong Sing v. Buang Nassiam & Anor [2009] 1 PIR [27] ***(refd)***

Mohd Samsudin Ismail v. Tan Yeow Hwa & Anor [2000] 4 CLJ 398 HC ***(refd)***

Teoh Chu Thong v. Anantha Kiruisan PSR & Anor [2008] 2 CLJ 603 CA ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

For the plaintiff - Brijnandan Singh Bhar; M/s Chindaya P & Assocs
For the defendant - Shanta Mohan; M/s VP Nathan & Partners

Reported by Emm Zehra

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff, Madame Letchumay Palaniappan claims against the defendant for damages; general and special damages due to injuries suffered from a road accident at about 11am on 10 June 2005 at KM26, Jalan Kuala Lumpur-Seremban, Kajang, Selangor. The plaintiff was a pedestrian crossing the road and the defendant, Mr Mahalingam Subramaniam, is the lorry driver driving motor lorry, registration number WCB 8396 whom the plaintiff alleged collided into her. The Sessions Court judge ("SJ") found the plaintiff to be 100% negligent (liable) and dismissed the plaintiff's claim. The plaintiff appealed to the High Court against that decision on both issues on liability and quantum. I allowed

the appeal and apportioned liability between the plaintiff at 70% and the defendant 30%.The plaintiff, still dissatisfied, appealed against my decision on both issues.

Findings On Liability By Sessions Judge (SJ)

[2] The findings on liability by SJ are as per below:

> Berdasarkan keterangan-keterangan ini, adalah dapatan saya bahawa kemalangan yang menimpa diri plaintif adalah 100% diakibatkan dari kelalaian dan kecuaian plaintif sendiri berdasarkan fakta-fakta berikut:
>
> 1. Jika merujuk kepada rajah kasar P1, dan berdasarkan keterangan plaintif sendiri kemalangan berlaku semasa plaintif ingin melintas dari A1 sedang berjalan keA4.
> 2. Tujuan asal beliau adalah untuk menyeberangi keseluruhan jalan seperti didalam rajah kasar P1 iaitu dari A1 ke A9.
> 3. Berdasarkan rajah kasar jalan yang ingin plaintif seberangi adalah satu jalan yang mempunyai 5 lorong.
> 4. Berdasarkan rajah kasar, terdapat persimpangan yang dikawal oleh lampu isyarat.
> 5. Jarak antara persimpangan lampu isyarat dengan tempat kemalangan adalah dianggarkan oleh pegawai penyiasat (SP1) 50 meter (anggaran yang dibuat 4 tahun selepas kejadian kerana SP1 tidak mengukur sendiri semasa melawat tempat kejadian).
> 6. Saiz badan plaintif adalah dalam kategori saiz yang besar.
>
> Berdasarkan dapatan-dapatan ini saya membuat kesimpulan seperti berikut:
>
> > Plaintif seharusnya sedar dan mengetahui (aware) bahawa menyeberangi jalan yang lebarnya 19.4 meter (berdasarkan keterangan pegawai penyiasat dan kiraan saya dari A1 ke A9) adalah satu tindakan yang "inherently dangerous".
> >
> > Beliau seharusnya mengambil langkah-langkah yang lebih selamat bagi memastikan bahawa jalan tersebut benar-benar selamat sebelum diseberangi.
> >
> > Satu langkah yang bijak yang mungkin dapat mengelakkan sebarang risiko kemalangan adalah dengan menggunakan lampu isyarat yang berada 50 meter dari tempat kejadian. Pada hemat saya walaupun kedudukan lampu isyarat ini sedikit jauh, tetapi jika plaintif memanfaatkan lampu isyarat ini besar kemungkinan kemalangan ini tidak akan berlaku sama sekali.

Saiz badan plaintif (bukan dengan niat untuk merendahkan plaintif) akan menyebabkan:

a. Kesukaran plaintif untuk berlari atau bergerak dengan pantas;

b. Akan menambahkan lagi risiko sekiranya ada banyak kenderaan yang perlu berselisih di atas jalan.

Keseluruhan jalan yang ingin diseberangi adalah lebar dan jalan ini berdasarkan keterangan pegawai penyiasat SP1 adalah sebatang jalan yang sibuk.

Maka tindakan plaintif melintas jalan seperti yang beliau lakukan mengundang risiko yang amat besar, apatah lagi dengan saiz badan beliau tersebut menyebabkan beliau akan sukar untuk bergerak pantas bagi mengelakkan kenderaan-kenderaan yang lalu lalang dan juga jika beliau berdiri seperti dalam keterangannya sendiri, ia mengundang beliau digesel oleh kenderaan kerana "safety margin" yang semakin kecil.

Adalah menjadi dapatan saya bahawa versi defendan adalah lebih probable mengenai bagaimana kemalangan berlaku berbanding dengan versi plaintif berdasarkan alasan-alasan berikut:

1. Jika benar sebagaimana dakwaan plaintif bahawa beliau telah dilanggar terlebih dahulu oleh lori defendan dan jika keterangan plaintif ini boleh dipercayai, motolori defendan menghampirinya dalam kelajuan yang tinggi.

2. Maka kesan dari impak oleh lori defendan ini sudah pasti akan menyebabkan plaintif tercampak jauh dari lori dan kemungkinan besar beliau akan dilanggar oleh kereta lain.

3. Impak tersebut juga akan menjauhkan plaintif dari berada di bawah lori defendan.

4. Jika benar sebagaimana dakwaan plaintif bahawa beliau sendiri tidak melihat kehadiran lori defendan, jelas menunjukkan kealpaan plaintif dalam memastikan jalan tersebut selamat untuk dilintas.

5. Ianya diakibatkan dari plaintif yang dilanggar oleh kenderaan lain menyebabkan plaintif terjatuh ke bawah lori defendan dan ini adalah versi yang lebih probable.

Oleh yang demikian saya memutuskan bahawa plaintif pertama adalah 100% cuai sumbangan dalam kemalangan ini.

[3] Findings On Quantum By Sessions Judge (SJ)

Kuantum

Gantirugi Khas

(a) Kos penjagaan tidak dibenarkan.

(b) Kos kaki palsu tidak dibenarkan.

(c) Kehilangan pendapatan dibenarkan.

RM517 x 12 x 5.5 tahun	=	RM 34,122.00
Gaji telah dibayar	=	RM 1,006.26
		RM 33,115.74

Gantirugi Am

Akibat dari kemalangan ini plaintif telah mengalami kecederaan kehilangan kedua-dua belah kakinya.

(d) "Severe crush injury both the lower limbs - Double Above knee amputation" dibenarkan RM120,000.

Submissions Of Plaintiff And Defence Counsel

[4] Mr Brijnandan Singh Bhar, counsel for the plaintiff submitted that the plaintiff crossed from point A1 to go to A9 (from left to right of the sketch plan, P1) and when she stopped at point A4, the defendant's motor lorry which came from the direction of Kuala Lumpur (from bottom to the top of the sketch plan) grazed her and she fell under the lorry and the right rear tyres of the motor lorry ran over both her legs. The defendant's counsel, Mr B. Shanta Mohan on the other hand submitted that the plaintiff crossed the road from point A9 to go to A1 (from right to left of the sketch plan) and when she was crossing a vehicle coming from the opposite direction of the defendant's motor lorry, from the direction of Seremban to Kuala Lumpur (from top to bottom of the sketch plan) collided into her resulting in her being flung and landing under the defendant's motor lorry which ran over both her legs. Mr Brijnandan Singh Bhar submitted that SJ erred in accepting the defendant's version and finding the plaintiff 100% liable while Mr B Shanta Mohan submitted that the decision of the SJ is correct and should not be disturbed.

Decision Of The Court

[5] After perusing the notes of evidence, the testimonies of the witnesses, in gist, are as follows:

Plaintiff's Version (SP3)

[6] According to the plaintiff, Madame Letchumay Palaniappan, (SP3), she alighted from a bus at point A1. She successfully crossed the road from point A1 to point A4 (from left to right of the sketch plan, P1) and while standing at A4 which is the middle of the road, waiting to cross further to the other side which is at

point A9, suddenly a motor lorry No. WCB 8396 coming from the direction of Kajang (from the bottom to the top of the sketch plan, P1) collided into her. She fell and the motor lorry No. WCB 8396 ran over both her legs. In her police report, P5, she stated that she saw the defendant's motor lorry driving at high speed before hitting her but in cross examination, she acceded that she only saw the defendant's motor lorry after she fell after being grazed by it and not before.

Defendant's Version (SD2)

[7] The defendant, Mr Mahalingam Subramaniam, (SD2), alleged that the plaintiff was knocked down by another vehicle which resulted in the plaintiff falling under his motor lorry and her legs being ran over by the lorry's right rear tyre. In Mr Mahalingam Subramaniam's police report, D10, Mr Mahalingam stated that he was from Kajang on his way to Semenyih (from the bottom to the top of the sketch plan, P1, towards Seremban) when he stopped at the traffic light when it turned red. In front of his lorry were five other vehicles. When the traffic light turned green, he proceeded. Suddenly he heard a sound (dentuman) behind his lorry and stopped, alighted from his lorry and found a pedestrian under his lorry near his right rear tyre. He stated that a Mr Balakumar a/l Gopalan who was at the scene of the accident informed him that the plaintiff fell and landed under his motor lorry after being grazed by a car coming from the opposite direction. Both he and Mr Balakumar Gopalan then sent the plaintiff to a nearby clinic for medical treatment. Thus Mr Mahalingam Subramaniam did not see how the accident took place and his version was based on what was recounted to him by Mr Balakumar Gopalan. In evidence Mr Mahalingam Subramaniam testified that from the time he heard the sound and the time he stopped his vehicle, he had travelled a distance of about 20 feet.

Balakumar Gopalan's Version (SD1)

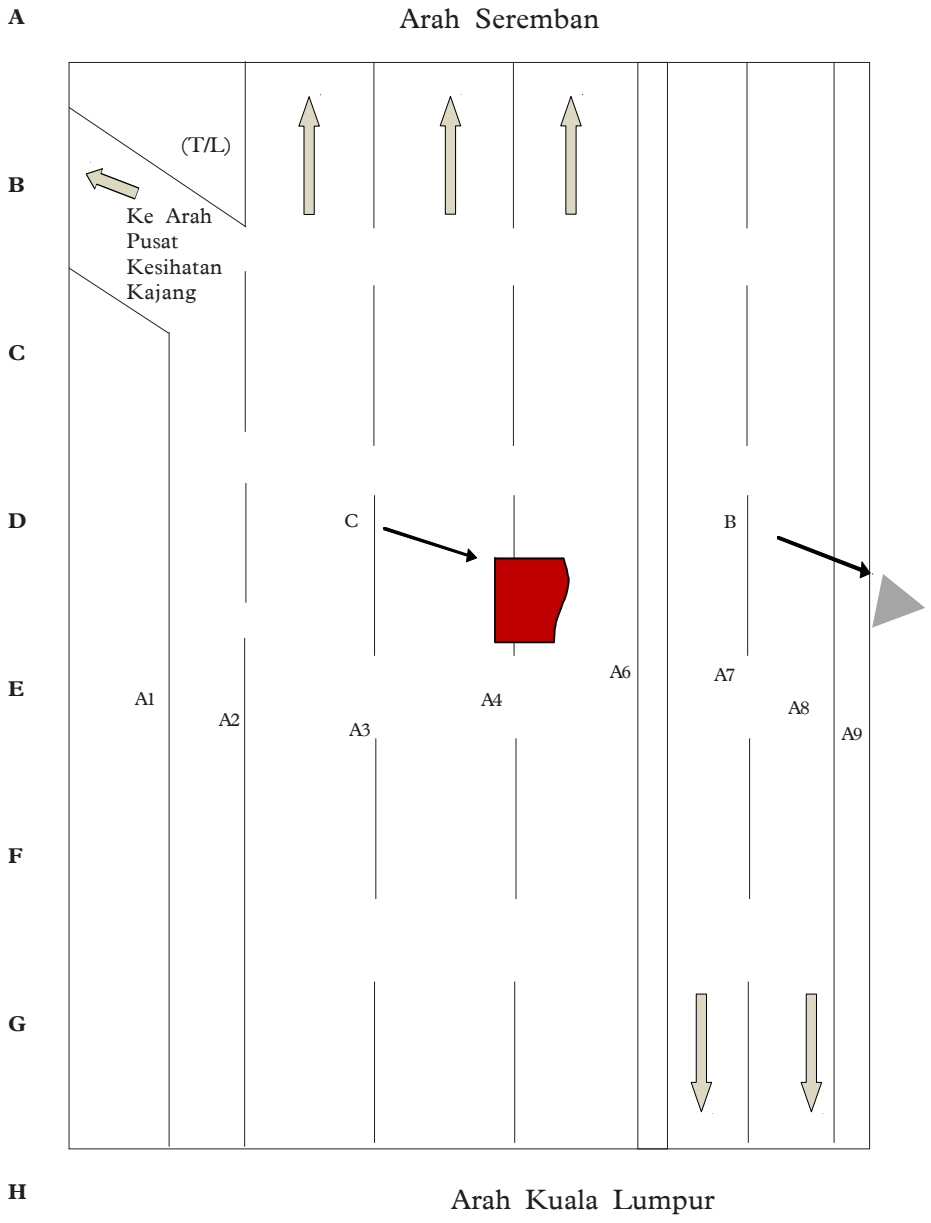
[8] According to Mr Balakumar Gopalan (SD1), on the date of the accident, he was driving his car from Kajang on his way to Semenyih (same direction as the defendant, Mr Mahalingam Subramaniam from the bottom to the top of the sketch plan), when he stopped at the traffic light which was red. In front of his car was a motor lorry. He saw a lady pedestrian (the plaintiff) trying to cross the road from right to left of the sketch plan (from point A9) when she was collided into by a white car coming from the opposite direction (from the top to the bottom of the sketch plan). The plaintiff fell and landed near the rear of Mr Mahalingam

Subramaniam's lorry which lorry was in front of his car. When the traffic light turned green, Mr Mahalingam Subramaniam proceeded and his right rear tyre ran over the plaintiff's legs. Mr Mahalingam Subramaniam then stopped, alighted from his motor lorry and assisted the plaintiff. At that point in time he realised that the lorry driver is his uncle. He followed Mr Mahalingam Subramaniam to the police station to make a report but was told by the police personnel there that it was not necessary for him to do so since he was not involved in the accident. He knew that Mr Mahalingam Subramaniam had included his name in his police report, D10.

Investigating Officer's Evidence (SP1)

[9] The investigating officer, (I.O), Assistant Superintendant Sila AK Gadong, (SP1) testified that he drew a sketch plan and key, P1 and P1k of the scene of the accident. He testified that through his investigation, the defendant was driving motor lorry WCB 8396 from the direction of Kuala Lumpur to Seremban (from the bottom to the top of the sketch plan, P1) and the plaintiff was a pedestrian crossing the road. There was no police report made by Mr Balakumar Gopalan (SD1) and he did not know whether Mr Balakumar Gopalan came with the defendant to the police station to make a police report. He sought assistance from Mr Mahalingam Subramaniam about Mr Balakumar Gopalan but was told by Mr Mahalingam Subramaniam that he did not have Mr Balakumar Gopalan's telephone or house address.

[10] According to the I.O, there were no accident marks found on motor lorry WCB 8396 or on the road except for blood stains (kesan darah). Through his sketch plan and key, P1 and P1k, he explained that the accident occurred at a five lane road; three lanes up towards the direction of Seremban and two lanes down towards the direction of Kuala Lumpur. There is blood stains (kesan darah) marked as C on the road, believed to be that from the plaintiff found at lane A4. There is a bus stop (tempat menunggu bas) marked as B at the side of lane A9. There is a traffic light marked as T/L at the top of P1 which is about 50 meters away from where the accident took place. The sketch plan and key, P1 and P1k are produced below.


Arah Seremban
(T/L)
Ke Arah Pusat Kesihatan Kajang
C
B
A1
A2
A3
A4
A6
A7
A8
A9
Arah Kuala Lumpur

UKURAN DALAM METER(M):

A1 KE A2 : 2.50 M.
A2 KE A3 : 3.30 M.
A3 KE A4 : 3.40 M.
A5 KE A6 : 2.00 M.
A6 KE A7 : 3.30 M.
A7 KE A8 : 3.30 M.
A8 KE A9 : 1.50 M.

PENUNJUK:

A1 : TEPI BAHU JALAN SEBELAH KIRI ARAH SEREMBAN.

A1 : GARISAN PUTIH PUTUS - PUTUS TEPI JALAN SEBELAH KIRI ARAH SEREMBAN.

A2 : GARISAN PUTIH PUTUS - PUTUS.

A3 : GARISAN PUTIH PUTUS - PUTUS.

A4 : GARISAN PUTIH PUTUS - PUTUS.

A5 : GARISAN PUTIH PUTUS - PUTUS.

A6 : GARISAN PUTIH BERKEMBAR (PEMBAHAGI JALAN).

A7 : GARISAN PUTIH PUTUS - PUTUS.

A8 : TEPI BAHU JALAN SEBELAH KANAN ARAH SEREMBAN.

A9 : TEPI BAHU JALAN SEBELAH KANAN ARAH SEREMBAN.

B : TEMPAT MENUNGGU BAS.

C : KESAN DARAH ATAS PERMUKAAN JALAN.

T/L : LAMPU ISYARAT

Findings On Liability

[11] From the evidence above, these are my findings.

(a) Plaintiff stated that she crossed the road from A1 to A4 and she wanted to go to A9. Since this is a five lane road which according to the investigation officer, SP1's calculation (from P1k from A1 to A9 is 19.4 meters wide which is equivalent to 63.6 feet) and the traffic was heavy at that time, the plaintiff's action in crossing the road is a reckless and dangerous action. She admitted that by crossing the road and standing at point A4 she had put herself in a dangerous position, exposing herself to unnecessary risk. She should not

have taken safety for granted. If she had still wanted to cross the road, she should have taken the sensible precaution by crossing near the traffic light at point T/L which is situated about 50 meters away. This will ensure some measure of safety for herself.

(b) Plaintiff did not see the defendant's motor lorry before the accident. This she admitted in her testimony where she agreed with defence counsel that she only saw the defendant's motor lorry after she fell after being grazed by it. She acceded that what she had stated in her police report, P5, that the defendant was driving at high speed before colliding into her was untrue. This fact, that she did not see the presence of the defendant's motor lorry showed that she is not aware and alert of her surroundings (lalai/alpa) and had not ensured that the road was safe before she crossed it, thus negligence on her part.

(c) The SJ accepted the defendant's version that the plaintiff crossed the road and that she was collided by another vehicle from the opposite direction before landing under the defendant's motor lorry which ran over her legs. As such the evidence of Mr Balakumar Gopalan, SD1, a so-called independent witness was accepted by the SJ. If this is so then the SJ would have accepted the evidence of SD1 that the plaintiff crossed the road from the right to the left, from A9 to A4 to go to A1. But in the SJ's judgment he also stated that the plaintiff crossed the road from A1 to A4 without ensuring that it was safe to do so. The SJ though accepting the defendant's version as being more probable has not clearly stated from which direction the plaintiff had crossed the road, whether from A9 to A4 to go to A1 or from A1 to A4 to go to A9. There was no clear finding of fact by the SJ. On the one hand SJ said the plaintiff crossed from A1 to A4 and in the next a car collided into the plaintiff and the plaintiff landed under the motor lorry and as such he accepted the defendant's version as being more probable. This goes against the principles in the Court of Appeal's case of *Karumalay Vanniyan & Anor v. Ananthan Rethinam* [2005] 2 CLJ 429 where it was held as follows: (See also *Gan Yook Chin & Satu Lagi lwn. Lee Ing Chin & Yang Lain* [2001] 1 LNS 255).

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either

> accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach of judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
>
> In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involves, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle.

(d) The SJ accepted the defendant's version that the plaintiff was collided into by another vehicle coming from the opposite direction, that is if one is to look at P1 from the top to bottom of the sketch plan (Seremban to Kuala Lumpur). A perusal of P1 shows that there are 2 lanes from the top (Seremban to Kuala Lumpur) and 3 lanes from the bottom (Kuala Lumpur to Seremban) and this opposing lanes are delineated/divided by a divider (*pembahagi jalan*) A6, being two white continuous lines (double lines). The plaintiff's legs were ran over by the defendant's lorry at C where the blood stains believed to be that of the plaintiff's were found which is at lane A4. If the defendant's version is accepted that the plaintiff was collided by a vehicle (unknown vehicle) which came from the opposite direction, from lane A7 from the direction of Seremban to Kuala Lumpur, that is from the top of the sketch plan to the bottom, she would have been flung about 5.3 meters to 8.7 meters away (A7 to A4) which is about 17.4 feet to 28 feet to land at A4. The plaintiff is

obese in size as can be seen in the photographs at p. 338 of the record of appeal (ROA). It is improbable with her size to be flung to such a distance. Be that as it may, if she had been collided by the unknown vehicle and had flung about 17 to 28 feet away, the vehicle which collided into her must have been travelling at a high speed indeed. She would, having been flung at such a distance, sustained serious and extensive injuries to other parts of her body especially so when she is obese. She would have suffered abrasions, lacerations and even dislocations and fractures to her her bones. But this was not the case. The initial medical report of Dr Ip Wai Mun, a clinical consultant from the orthopaedic department of Kajang Hospital dated 28 September 2005 at p. 327 of the record of appeal (ROA) showed that the plaintiff sustained severe crush injury to both the lower limb which resulted in her having to undergo above knee amputation to both her lower limbs. Beside the injury to her legs, there were no other injuries found on her body. As such, the SJ's finding that the defendant's version is more probable, that the plaintiff was collided by an unknown opposing vehicle and was flung to land under the defendant's lorry does not commensurate with the injuries sustained by the plaintiff which shows no injuries of being collided and flung at such a distance but only injuries confined to both her legs consistent with the plaintiff's version of being grazed by the defendant's motor lorry, falling under it and as a consequence having both her legs being ran over.

(e) The SJ made a finding that the plaintiff's version is not probable. This is so since according to SJ if the plaintiff's version is to be believed that she was collided by the defendant's motor lorry, then since the motor lorry was travelling at high speed the impact of the collision would not have resulted in the plaintiff landing under the motor lorry and having her legs being ran over but instead being flung to such a distance far away from the defendant's motor lorry and in such circumstances the plaintiff would probably have been collided by another vehicle. (*"Jika benar sebagaimana dakwaan plaintif bahawa beliau telah dilangar terlebih dahulu oleh lori defendan dan jika keterangan plaintif ini boleh dipercayai, motorlori defendan menghampirinya dalam kelajuan yang tinggi. Maka kesan dari impact dari lori defendan ini sudah pasti akan menyebabkan plaintif tercampak jauh dari lori dan kemungkinan besar beliau akan*

dilanggar oleh kereta lain"). This finding by the SJ is not correct. There is no evidence that Mr Mahalingam Subramaniam was driving his lorry at high speed. The plaintiff in her testimony acceded that her police report, P5, which stated that the motor lorry was driven at high speed was untrue. She admitted in cross-examination that she only saw the motor lorry after she fell after being grazed by it and not before. Thus the SJ's finding that the defendant was driving at high speed is based on an incorrect and unsubstantiated premise.

(f) The defendant, Mr Mahalingam Subramaniam's (SD2) version is that he stopped at the traffic light since it was red. In front of his lorry were five other vehicles. When the traffic light turned green, the other vehicles in front of his lorry started to move. He engaged his gear and proceeded. Just as he proceeded, he heard a sound (dentuman) and stopped his lorry, alighted from it and found the plaintiff with her legs injured. In cross-examination, he stated that from the time he heard the sound and he stopped, he had travelled a distance of about 20 feet. In such circumstances he would and could not, be driving at high speed since he had just proceeded to move and there were five other vehicles in front of him. The evidence of Mr Mahalingam Subramaniam and the injuries found only to the plaintiff's legs and not to the other parts of her body, to my mind, is more consistent with the plaintiff's version of how the accident took place; that she was crossing the road, when she was grazed by a vehicle (probably the defendant's motor lorry which was about to move when the traffic lights turned green) and she fell under the motor lorry and her legs were ran over by the right rear tyres of the motor lorry. She did not see the defendant's motor lorry as admitted by her in evidence maybe due to the fact that the motor lorry at that point of time when she was crossing was stationary. Only when the motor lorry moved and it grazed her and she fell, then only she saw it. The motor lorry as can be seen from photographs at pp. 356 and 357 of the ROA is a huge motor lorry (with eight tyres at the rear; four each on the right and left rear and one each in front of the motor lorry. Therefore the finding of the SJ is inconsistent with the evidence of Mr Mahalingam Subramaniam, the lorry driver.

A The plaintiff's version that the defendant's motor lorry grazed her (*bergesel*) with her and she fell under the lorry, which version she maintained throughout the trial is more probable since it is supported by the evidence of Mr Mahalingam Subramanian, the plaintiff and the injuries she sustained.

B It must be noted that the plaintiff maintained throughout the trial that she crossed the road from point A1 to A4 to go to A9 (from the left to the right of the sketch plan). This piece of evidence was never challenged by the defendant, though Mr C Balakumar Gopalan, SD1 did give evidence that the plaintiff crossed the road from A9 to A4 (from the right to the left) which is a complete different direction of travel. The effect of non-challenging or failure to cross-examine a witness on a crucial part of a case will amount to acceptance of the witness D testimony. In the Federal Court case of *Wong Swee Chin v. PP* [1980] 1 LNS 138, the court said as follows on the effect of non-challenging the case of a witness.

> Mr. Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held E that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the F appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains G unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

H In the case of the Court of Appeal of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 the court held that:

> The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his I opponent's is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. In the same case, Lord

> Halsbury had this to say (at p. 76): My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

(g) Apart from this, SJ had to be cautious in accepting the evidence of Mr Balakumar Gopalan "the so called independent witness". This is so since Mr Mahalingam Subramaniam had from the onset tried to hide the fact that Mr Balakumar Gopalan is his brother in law. The question here is whether Mr Balakumar Gopalan was really at the scene of the accident? It seemed to be such a coincidence that he was driving behind Mr Mahalingam Subramaniam at the material time and this fact was not appreciated or evaluated by the SJ; that due to their close relationship, Mr Balakumar being Mr Mahalingam's brother in law (*adik ipar*), there was a great possibility that Mr Balakumar is a "manufactured or fabricated witness" and his testimony has to be sieved and evaluated. SJ thus failed to make any evaluation of the credibility of Mr Balakumar and Mr Mahalingam's evidence due to their close relationship and neither did the SJ state that he accepted Mr Mahalingam's explanation that his non disclosure of Mr Balakumar's status as his brother in law was due to the fact that he was afraid to do so. (See *Teoh Chu Thong v. Anantha Kiruisan PSR & Anor* [2008] 2 CLJ 603 and *Kean Yick Enterprise Sdn Bhd v. Cherating Development Sdn Bhd & Anor And Other Cases* [2012] 3 CLJ 741; [2012] 1 MLRH p. 346).

[12] Therefore the finding of fact of the SJ on how the accident took place is flawed since it was based mainly on the evidence of Mr Balakumar, (SD1) whose evidence is suspect without taking into account the evidence of the plaintiff, Mr Mahalingam (SD2),

A the I.O (SP1), plaintiff's medical reports and the mute evidence of the sketch plan and photographs. I am very aware that an appellate tribunal should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion (*Hussaina Rani*
B *Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500, CA; *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189 and *Hitam Abdullah & Anor v. Kok Foong Yee & Anor* [1973] 1 LNS 48, Privy Council referred to). But as stated earlier, from the evidence adduced
C especially that of the plaintiff, Mr Mahalingam (SD2), the medical reports, photographs of the plaintiff, the lorry, the road where the accident took place and the sketch plan and key (mute evidence), it can be clearly deducted that the SJ had erred in coming to the conclusion that on the balance of probabilities the defendant's
D version is inherently more probable. Be that as it may, the plaintiff in crossing a five lane (two way) heavily traffic laden road spanning a distance of 19.4 meters (63.6 feet) which she knew is an inherently dangerous feat has herself to blame for courting danger and as such is substantially negligent. The defendant, I feel
E is not entirely blameless. Thus the SJ's decision in finding the plaintiff to be 100% liable and thus dismissing the plaintiff's claim is set aside. Appeal on liability is allowed and liability is thus apportioned at 70% plaintiff and defendant 30%.

F **[13] Findings On Quantum**

General damages

(1) Amputation of lower limbs.

G The SJ has awarded RM120,000 for this injury. The appellant/plaintiffs' counsel Mr Brijnandan Singh Bhar contended that this amount is manifestly low and prayed for RM250,000 as a fair amount for amputation of both legs and in support submitted these cases below:

H

(i) *Denddy Bah Derin v. R Sellurisuriamurthy Ramamutty* [2010] 2 PIR [15] where RM110,000 was awarded for loss of a leg from level of the upper third of femur (high above knee amputation).

I

(ii) *Ling Chong Sing v. Buang Nassiam & Anor* [2009] 1 PIR [27] where RM80,000 was awarded for above knee amputation.

(ii) *Azman Sabtu v. Shahrin Sidirman* [2010] 1 PIR [59] where RM220,000 was awarded for spastic hemiplegia.

[14] The respondent's counsel, Mr B Shanta Mohan suggested RM120,000 which suggestion was accepted by SJ and submitted the case of *Lai Moi Lan & 6 Others v. Mahari Maskop & Anor* [2008] 1 PIR [16], where RM120,000 was awarded for closed comminuted fracture of the left femur, fracture of the neck of the left femur, open fracture of the left tibia and fibula, open fracture of the left ankle, compound fracture of the left foot with skin loss, resulting in above knee amputation.

[15] It must be noted that in the Sessions Court, the plaintiff's counsel than had submitted a sum of RM170,000 for this injury and I feel in such circumstances Mr Brijnandan Singh Bhar cannot now ask for more. The plaintiff is bound by their submission in the Sessions Court and should be estopped from asking for more. (*Mohd Samsudin Ismail v. Tan Yeow Hwa* [2000] 4 CLJ 398 referred to). As such I allow the sum of RM120,000 to be increased to RM170,000. This sum of RM 170,000 is in line with the amount awarded in the case of *Ling Chong Sing v. Buang Nassiam & Anor (supra)* as submitted by Mr Brijnandan Singh Bhar above.

Special damages

Nursing care

[16] SJ disallowed the claim for nursing care. Mr Brijnandan Singh Bhar submitted that a sum of RM500 a month be awarded to the plaintiff for 29.7 years. Mr B Shanta Mohan submitted that there was no documentary evidence to support this claim. Plaintiff gave evidence that she paid someone to take care of her to bathe and to assist her for all activities of daily living. In the specialist report of Dr M N Manukaran, a consultant orthopaedic surgeon from Manu Orthopaedic & Trauma Clinic dated 20 July 2006, the specialist at pp. 337,339 and 340 of ROA has this to say.

Present Complaints

(1) She has loss of both lower limbs above the knee

(2) She has pain in the legs on and off

(3) She is unable to stand or to walk

(4) She is unable to do housework

(5) She requires a wheelchair for mobilization

(6) She is unable to work

(7) She needs assistance for all activities of daily living.

(8) Walking with bilateral above-knee prosthesis is an arduous task. She will require a lot of training and therapy. She will not be able to squat, jump or run.

(9) Mrs Lechumay a/p Palaniappan has permanent disabilities of both the legs. She may not be able to return to her previous job. She will have great difficulties in undertaking jobs and activities that require standing, walking, running, jumping, climbing, squatting and carrying of weights. She will also need assistance for activities of daily living. She will probably never find any employment.

[17] In such circumstances I feel a sum of RM400 per month is fair to be awarded to the plaintiff. Since the plaintiff was 44 years old at the time of accident and the life expectancy in Malaysia is about 75 years and after taking off 1/3 (one third) as contingency, therefore the calculation is RM400 per month x (75 years - 44 years = 31 years - 10.33 years (1/3 contingency) = 20.66 years x 12 = RM99,168.00. Therefore this sum is rounded to RM99,200.00 and awarded for nursing care.

Prosthesis

[18] SJ disallowed this claim and no reasons were given. Mr Brijnandan Singh Bhar submitted that although SOCSO has paid for one set of prosthesis that does not in law bar the plaintiff from claiming from the defendant and prayed that RM215,388.00 be awarded. Mr B Shanta Mohan submitted that the plaintiff will be supplied with prosthesis by PERKESO throughout her life and by allowing the plaintiff to claim again under this suit would tantamount to unjust enrichment.

The Pertinent Question Here Is Whether She Needs To Use Prosthesis And Whether, In The Circumstances, She Will Use Them

[19] In Dr M N Manukaran's medical report (referred to earlier) dated 20 July 2006 (pp. 336 to 340 of ROA) and at p. 337, one of the many complaints of the plaintiff is that she has pain in her legs on and off and that she is unable to stand or walk and thus requires a wheelchair for mobilisation. The photographs of the plaintiff at p. 338 showed the plaintiff who is obese sitting in a wheelchair. At p. 339, Dr M N Manukaran opined that bilateral above-knee prosthesis should be made available for her to walk. He further stated that walking with bilateral above-knee prosthesis is an arduous task and that she will require a lot of training and therapy.

[20] In the report dated 21 April 2006 by Dr Ip Wai Mun, a clinical orthopaedic consultant at p. 367 ROA, she stated that the plaintiff is obese and ambulate by using a wheelchair. In her prognosis, she opined that the plaintiff is unlikely to walk with prosthesis and need life-long use of wheelchair for ambulation.

[21] From the two reports it can be gathered that due to the obesity of the plaintiff, her complaints of pain in both her legs, and the arduous task of walking with above knee prosthesis, she would most unlikely use the prosthesis but would instead prefer to use the wheelchair for mobilisation. As such the decision of SJ in disallowing this claim is maintained.

Loss Of Earning

[22] SJ awarded for loss of earning at RM517 per month for 5.5 years minus RM1,006.26 for two months salary which was already paid to the plaintiff which comes to a total of RM33,115.74. Mr Brijnandan Singh Bhar argued that the plaintiff worked in a factory earning RM8,67 per month. She also worked in a clinic earning RM4,52 per month. At the time of the accident she was on her way to work at the clinic. Therefore the total earnings plus overtime is RM1,317. From this sum RM350 should be deducted for living expenses which leaves RM967. Therefore RM967 x 12 x 5.5 years = RM63,822.

[23] Mr B Shanta Mohan argued that if the court is minded to award for loss of earning, from the pay slips, P4A to F, the average salary of the plaintiff is RM867 and deduct RM350 for living expenses, it comes to RM517 a month. For 5.5 years it would total to RM34,122. From this sum, RM1,000.26 is to be deducted for the two months pay already received by the plaintiff after the accident. Perusing the documents tendered by the plaintiff, I would agree with the calculation submitted by Mr B Shanta Mohan and thus the decision of SJ to award RM33,115.74 is maintained.

Conclusion

[24] In summary, the trial judge has not fully evaluated the evidence of the witnesses, especially the evidence of Mr Balakumar Gopalan and the medical reports and the mute evidence before coming to his findings. As such, his decision is set aside. The appeal on liability is allowed which liability I now apportioned between the plaintiff at 70% and the defendant at 30%. On the issue on quantum, the claim for nursing care which was dismissed by SJ is allowed and RM99,200 is awarded. The claim for amputation of the two lower limbs is increased from RM120,00 to RM170,00. The claim for prosthesis which is dismissed by SJ is maintained and the sum of RM34,122 awarded for loss of earning by SJ is also maintained.

[25] Mr Shanta Mohan prayed that costs be fixed at RM3,000 and Mr Brijnandan Singh Bhar prayed for costs to be taxed.